THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.....

WILLIAM E. BAKER and MARTHA D. BAKER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

Reference to the opinion below, a statement of the grounds upon which the jurisdiction of the Court is invoked, and a statement of the case, under appropriate headings, are set out in the foregoing petition, and to avoid duplication, are not repeated here.

SUMMARY OF ARGUMENT

(1) The imposition of an income tax upon the official compensation of a United States District Judge

taking office prior to the taxing Act is a diminution of such salary within the inhibition of Section 1, Article III of the Constitution of the United States.

(2) At the time that Judge Baker took office the Revenue Act of 1918 had been held unconstitutional and inoperative, and, in legal contemplation, there was no income tax statute in existence at such time applicable to his official compensation.

(3) If the Circuit Court of Appeals be correct in its conclusion that Judge Baker took office under a Congressional policy of taxing his salary (Revenue Act of 1918), such policy was reversed and his salary freed from income tax by the Revenue Act of 1929, and certainly by the Revenue Act of 1932, as stated by the Circuit Court of Appeals. Therefore, during his term of office there was a period in which no tax was imposable on his compensation and prior Congressional policy, the tax act having been repealed as aforesaid, becomes immaterial. The constitutional inhibition is *"during"* continuance in office. Accordingly, regardless of Judge Baker's taxable status at the time of his appointment, during his continuance in office his salary became tax free, and, accordingly, a subsequent tax imposition is barred by the Constitution.

ARGUMENT

It will perhaps make for clarity if the statutory history as to taxation of judicial salaries be considered, it being borne in mind that Judge Baker was appointed and qualified on April 3, 1921.

Prior to that date Section 213 of the Federal Income Tax Act of February 24, 1919, commonly called the Act of 1918, had imposed an income tax upon all sal-

aries, etc., "including in the case of * * * judges of the Supreme and inferior courts of the United States * * * the compensation received as such." On June 1, 1920, this Court, in *Evans* v. *Gore*, 253 U. S. 245, held such law unconstitutional, as applied to judges appointed prior to its enactment, because involving a diminishment of salary of a constitutional judicial officer in violation of Article III, Section 1 of the Constitution of the United States, providing as follows:

> "* * * The judges, both of the superior and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

Thereafter the Revenue Act of 1921 (Section 1400(a)), generally repealed, as of January 1, 1921, the Revenue Act of 1918.

It is the contention of petitioner that, at the time of Judge Baker's appointment, there was no income tax whatever imposable, it being the contention of the respondent, adopted by the Circuit Court of Appeals, that the Revenue Act of 1921 was, for the purposes of this proceeding, a continuance of the Revenue Act of 1918. The repealing section reads in part as follows:

> "In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provisions imposing such tax shall remain in force until the corresponding tax under this Act take effect under the provisions of this Act." Section 1400(b).

Counsel respectfully urges that from the above quoted

language a conclusion must be drawn directly opposite to that of the learned Court below. The provision of the Act of 1918 is that a tax shall remain in force *until the corresponding tax under "this Act" shall take effect*. The language was merely to cover any interregnum between the two Acts, and when the Act of 1921 took effect, the latter was comprehensive and specifically repealed the Act of 1918. The repealing section in question further provides:

> "The parts of the Revenue Act of 1918 which are repealed by this Act shall (unless otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes which have accrued under the Revenue Act of 1918 at the time such parts cease to be in effect, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes."

Such is a clear indication of the intent of Congress to repeal the Act of 1918 so far as any future operation is concerned. Of course, the taxes here involved are not assessed either under the Act of 1918 or the Act of 1921. The Act of 1921 was passed on November 23rd of that year, after Judge Baker's appointment. It accordingly follows:

(a) At the time of Judge Baker's appointment the Revenue Act of 1918, in so far as it purported to tax the salaries of judges appointed prior to its enactment, had been absolutely nullified by *Evans* v. *Gore*, on June 1, 1920.

(b) Section 1400(a) of the Revenue Act of 1921 repealed "Title II (called 'Income Tax')", of the Revenue Act of 1918, as of January 1, 1921, Title II, Sec-

tion 213 of the Revenue Act of 1918 being the section that had been held unconstitutional in *Evans* v. *Gore,* as applied to a judge appointed prior to its enactment. The Revenue Act of 1918, therefore, at the time of the appointment of Judge Baker had been held invalid, as to previously appointed judges, by the Supreme Court of the United States, on June 1, 1920, and was to be repealed by the Act of 1921 as of January 1, 1921, that date being prior to the appointment of Judge Baker.

However, it is entirely immaterial whether or not the Act of 1921 be considered a continuation of the Act of 1918, for reasons hereinafter discussed. Even if a status of taxability in the case of Judge Baker's salary were maintained from the time of his appointment to June 6, 1932, the Act of that date specifically eliminated taxation of salaries of judges appointed prior to its enactment.

(c) On June 1, 1925, the Supreme Court decided *Miles* v. *Graham,* 268 U. S. 501, 69 L. ed. 1067, to the effect that an income tax upon a Federal judge's salary was an unlawful diminution thereof, even though he were appointed subsequent to the taxing act. This case has been overruled by the later case of *O'Malley* v. *Woodrough,* hereinafter discussed, *but the Woodrough case does not affect the holding of Evans* v. *Gore.* Prior to this decision Section 213 of the Revenue Act of 1921 purporting to tax the salary of judges of inferior courts of the United States (but only applicable in the light of *Evans* v. *Gore* to after-appointed judges) was embodied without substantial change in Section 213 of the Revenue Act of 1924, and was carried into the Act of 1926, but in the Act of 1928 (Section 22) the specific inclusion of judges' salaries was omitted.

It was the position of the Tax Court that omission of the clause including Federal Judges' salaries in the Act of 1928 was of no significance because under general definitions such salaries would have been taxed to the extent constitutionally possible. The Tax Court cites the following from the Report of the Ways and Means Committee:

> "No changes are made in the general definition of gross income in section 22(a) except to omit as surplusage the following clause which appears in section 213(a) of the 1926 Act:
>
> " '(including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such)'
>
> "In so far as any such compensation may be taxed under the Constitution, it is already included within the general definition in the bill."
>
> Report, Ways and Means Committee, 70th Cong., First Sess., 1939-1 C. B., Part 2, 392.

It is respectfully submitted that it is obvious that such conclusion may not be drawn. At the time of the passage of the Act of 1928 everyone considered (under *Evans* v. *Gore* and *Miles* v. *Graham*) that a judge's salary, whether appointed prior or subsequent to a taxing act, was not subject to income tax imposition. The inclusive reference that was omitted from the Act of 1928 went not only to the salary of judges, but to all other officers and employees, whether elected or appointed, of the United States and its dependencies, and it is clear that what the Ways and Means Committee meant in its Report was that *other salaries* were included

in the general definition, and the omission of the inclusive reference was to make it clear that salaries of judges who were under constitutional protection were not to be taxed. It is, therefore, respectfully submitted that the Act of 1928 repealed the previous inclusion of judges' salaries. This circumstance, however, is also immaterial because there can be no question that the salary of Judge Baker was freed of all tax by the Act of June 6, 1932.

There was complete absence of any imposition of income tax upon a Federal judge's salary until June 6, 1932, when the Revenue Act of that year was approved. Section 22 thereof provided for taxation of compensation of judges of the United States "taking office after the date of the enactment of this Act." It is significant that Congress recognized that such taxation affected the compensation of a judge, and diminished it, because Section 22(a) of the Act of 1932 goes further and provides that "all acts fixing the compensation of such Presidents and Judges are hereby amended accordingly." The provision in question reads as follows:

> "In the case of Presidents of the United States and judges of courts of the United States taking office after the date of the enactment of this Act, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

This language was continued, without change, in Section 22(a) of the Act of 1934, Section 22(a) of the Act of 1936, and Section 22(a) of the Act of 1938. The same language was included in Section 22(a) of the Internal Revenue Code of 1939, being a part of Volume 53, Part 1 of the Statutes-at-Large passed at the first

session of the 76th Congress, approved on February 10, 1939.

There can be no possible question of the effect of the Act of 1932 in freeing Judge Baker's salary from any tax whatsoever under any possible conception of the statutory situation. The Act of 1932 did two things:

(a) It made taxable salaries of judges only after the date of its enactment; and

(b) It amended all acts respecting salaries accordingly.

There is, of course, no question that from June 6, 1932, until the passage of the Public Salary Tax Law, Congress had not imposed any tax upon compensation of judges appointed prior to June 6, 1932. For that period Judge Baker enjoyed a salary without any possibility of income tax, even if the extreme position be taken that the Act of 1918 was extended by successive income tax enactments to June 6, 1932, a position, as we submit, erroneous, but which, if admitted, does not help respondent's contention. It cannot be denied that between June 6, 1932, and 1939, there was specific immunity under Congressional enactment.

On April 12, 1939 (Public No. 32, 76th Congress, Chapter 59, first session), the so-called Public Salary Tax Act was passed. By Section 3 of that Act, Section 22(a) of the Internal Revenue Code relative to gross income was amended by adding a new sentence reading as follows:

> "In the case of Judges of the Courts of the United States who took office on or before June

> 6, 1932, the compensation received as such shall be included in gross income."

Section 209 of the Public Salary Tax Act reads as follows:

> "In the cases of Judges of the Supreme Court, and of the inferior courts of the United States, created under Article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior Revenue Act."

It was recognized that this Act was intended to tax judges' salaries after the year 1938, a specific provision being included in the Act to foreclose any interpretation that it was applicable to salaries prior to the year 1939, and, of course, it was recognized that the salaries of judges appointed prior to June 6, 1932, had theretofore been exempt. The Conference Report contains the following language:

> "The present law subjects to Federal income taxation the compensation of so-called 'constitutional' judges taking office after June 6, 1932, and the compensation of so-called 'legislative' judges whether appointed on, before, or after June 6, 1932. The amendment adds to the class of taxable judges only so-called constitutional judges appointed on or before June 6, 1932, because they are the only group of judges now exempt."

From the above summary it is to be noted that the statutory developments are as follows:

(1) From June 1, 1920, the date of the decision of *Evans* v. *Gore*, holding the Act of 1918 invalid (as

to judges appointed prior to the enactment of a tax act) until November 23, 1921, the date of the enactment of the Act of 1921, there was no tax imposition applicable to a judge appointed prior to the enactment of the taxing Act, and in this period Judge Baker was appointed and qualified. It was, of course, found by the Court below that the Act of 1918 was continued by the Act of 1921 so far as diminution of salaries of Federal judges was concerned, but we believe it clear that such conclusion is erroneous, in view of the repeal language of the Act of 1921. However, for reasons elsewhere stated it is immaterial if there were such continuity.

(2) From November 23, 1921, the date of the enactment of the Act of 1921, to May 29, 1928, the date of the enactment of the Act of 1928, the statute purported to include the salaries of judges, but such was, in light *of Evans* v. *Gore*, as counsel insist, only applicable to judges appointed after the taxing Act, among which Judge Baker was not included. Under *Miles* v. *Graham*, decided on June 1, 1925, later overruled, this Act was ineffective, even as to judges appointed after November 23, 1921.

(3) From May 29, 1928, the date of the enactment of the Act of 1928, until June 6, 1932, there was *no specific inclusion* of Federal judges' salaries in gross income, regardless of the time of their appointment.

(4) From June 6, 1932, the date of the enactment of 1932 Act, until April 12, 1939, the date of the enactment of the Public Salary Tax Act, there was a specific provision that judicial compensation was taxable only as to judges taking office *after* June 6, 1932, an affirmative Congressional declaration rendering Judge Baker's salary non-includable in gross income.

It is, therefore, respectfully submitted—

(a) On April 3, 1921, the date of Judge Baker's qualification, there was no Income Tax Act applicable to his salary, but had there been, there was a later period when no tax act affected his, or any other Federal judge's salary.

(b) From the date of his appointment to April 12, 1939, more than eighteen years, Congressional policy recognized the non-taxable character of his salary, and during a part of that time there was no inclusion of any Federal judge's salary, no matter when he was appointed, and during the last seven years of that period there was a *specific provision* that *only the salaries of judges appointed after June 6, 1932, should be included.*

The Court below failed, we respectfully submit, to give proper effect to the period from June 6, 1932, to 1939, where, without question, Judge Baker's salary was immune under specific Congressional enactment. Assume, solely for the sake of argument, that his salary was subject to tax under the Act of 1919, that the Act of 1921 was a continuance of such Act, that the omission of the inclusive provision of 1928 was immaterial, that for the whole period from his appointment to June 6, 1932, his salary was subject to tax, and that, having assumed office with such taxable status, his salary, as stated by the Tax Court, was "already subject to the diminution" of an income tax. If all such be assumed, still it was not subject to income tax from June 6, 1932, to 1939. This is a controlling and decisive fact, even with the assumptions, and under the reasoning of the Tax Court, and the Circuit Court of Appeals. The Tax Court says in its opinion:

> "The issue then seems to us to narrow to whether when Judge Baker was appointed he was, under the law, already subject to the diminution, if it be such, of an income tax upon his compensation, for, if so, we are unable to distinguish this proceeding from *O'Malley* v. *Woodrough, supra.*"

As will appear from that language, as well as elsewhere in the opinion, the Tax Court assumed that the issue involved a question of diminution as between the status in 1921, when the Judge was appointed, and 1939, when the Public Salary Tax Act was passed. The Tax Court concluded since his salary was subject to tax imposition in 1921, it was subject to diminution, and, therefore, there could be diminishment by the Public Salary Tax Act.

The Circuit Court of Appeals in affirming the Tax Court states:

> "The consequence of the decision in *O'Malley* v. *Woodrough*, supra, as we interpret it, is that the Revenue Act of 1918, like that of 1932, by imposing an income tax on judges' salaries, fixed the salaries for the future at a stated amount less such income taxes as might be imposed. We cannot say that a judge is any the less subject to the tax, because in some years prior to the 1939 Act, Congress did not see fit to impose it. We interpret *O'Malley* v. *Woodrough, supra*, as meaning that the tax on Judge Woodrough's salary could be constitutionally increased along with general increases in income taxes, and, if once reduced, that it could be restored to its original amount, as in the case of other taxes."

It is respectfully submitted that the learned court overlooks that the constitutional provision inhibiting dimin-

ishment is "*during*" the term of office. Any recession from the highest point which a judicial salary reaches is a diminishment, even though it be, when diminished, larger than when the Judge took office. This question is specifically settled by *Booth* v. *United States*, 291 U. S. 339, 78 L. ed. 836, in which the Court uses the following language:

> "In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative."

It is respectfully submitted that the *Booth* case, not cited by the learned Court below, is in direct opposition to the language of its opinion above quoted. The former precedent specifically denies that where a burden upon a judicial salary has been reduced such burden may be restored to its original amount. In the *Booth* case a diminution after an increase was banned. The removal of a tax is equivalent to an increase in the salary taxed. It is the position of the Circuit Court of Appeals that when Judge Baker was appointed his liability for the tax, as established by the Act of 1918 remained in effect under the Revenue Act of 1921. There was no "point of time" when his salary was not made subject to the tax. The consequence of the decision in *O'Malley* v. *Woodrough*, as the Court interpreted it, was that the Revenue Act of 1918 fixed the salaries for the future at a stated amount less such income taxes as might be imposed. Judge Baker's salary at the time he took office was, therefore, $10,000.00 less X$ taxes. However, by Congressional action, he was probably relieved by the 1928 Act, and certainly by the 1932 Act from all income taxes. Such amounted to an increase

in his salary by removing the tax burden, as his salary was no longer $10,000.00 minus X$ but $10,000.00. Afterwards, under the rule of the Booth case the tax could not be reimposed.

The position of Judge Baker is entirely different from that of Judge Graham in *Miles* v. *Graham,* 268 U. S. 501. The latter was appointed on September 1, 1919, after the Act of 1919 had been enacted, and the case was decided on January 1, 1925. If subsequent Revenue Acts up to 1925 be considered as continuances of the Act of 1919, there was a constant statutory burden of diminution upon his salary through income tax, whereas in Judge Baker's case that burden was completely removed by specific Congressional enactment on June 6, 1932. Likewise Judge Baker's situation is different from that of Judge Woodrough, as shown in the case of *O'Malley* v. *Woodrough* later to be discussed. Judge Woodrough qualified as United States Circuit Judge on May 1, 1933, *after* the Act of 1932 which specifically made taxable salaries of judges appointed *after* its enactment.

As stated in the opinion of the Circuit Court of Appeals three decisions of this Court loom large in any consideration of this matter:

> *Evans* v. *Gore,* 253 U. S. 245, 64 L. ed. 887, decided on June 1, 1920;
> *Miles* v. *Graham,* 268 U. S. 501, 69 L. ed. 1067, decided on June 1, 1925; and
> *O'Malley* v. *Woodrough,* 307 U. S. 277, 83 L. ed. 1289, decided on May 22, 1939.

Certainly under these cases there can be no question

as to a tax being a diminution of the salary of a judge appointed prior to the taxing act. Such was specifically decided in *Evans* v. *Gore*, and by implication recognized in the other two cases.

A summary of the three opinions may be made in a few words:

(1) *Evans* v. *Gore* holds that a statute imposing an income tax upon the salary of a Federal Judge is unconstitutional as an unlawful diminution thereof, when applied to a judge taking office prior to its enactment.

(2) *Miles* v. *Graham* holds that such a statute is unconstitutional *in toto* even when applied to the salary of a judge appointed subsequent to its enactment.

(3) *O'Malley* v. *Woodrough* holds that a statute imposing an income tax on a Federal judicial salary is constitutional as applied to a judge appointed subsequent to its enactment, *Miles* v. *Graham* being overruled so far as inconsistent with this holding.

It is believed that no valid distinction may be made as a matter of law between the situation in the present case and that of *Evans* v. *Gore*, even though the position of the learned Court below be correct that under the Acts of 1918 and 1921 there "was no point of time when his (Judge Baker's) salary was not made subject to the tax." That point of time arrived certainly on June 6, 1932, and from 1932 to 1939 there was a complete absence of any taxing statute so far as Judge Baker's salary was concerned. Even if there had been a tax validly applicable to his salary when appointed, such tax was eliminated by Congress and his compen-

sation fixed as free of tax years before the Public Salary Act of 1939.

The latter was an enactment that imposed a tax upon judicial salaries previously tax exempt, and the situation is precisely the same as that in *Evans* v. *Gore*, where the Act of 1918 imposed a tax upon the previously tax-exempt salary of Judge Evans. The respondent is not seeking to tax Judge Baker's salary under the Act of 1918 or the Act of 1921, but under the Act of 1939, and, prior to that Act, there has been a complete freedom of his salary from tax imposition, just as there had been a freedom of Judge Evans' salary prior to the Act of 1918. Each salary had been "compensation" free of tax, and if, as is true under *Evans* v. *Gore*, a subsequent taxing Act be an unconstitutional diminution of a previously immune salary in the case of Judge Evans, such is equally true in the case of the salary of Judge Baker which, prior to 1939, had been immune. It cannot be contended that *O'Malley* v. *Woodrough* overrules *Evans* v. *Gore*. The majority opinion carefully isolates the question before the Court and with equal care limits its holding as applicable only to the case of a judicial salary, the recipient of which had been appointed subsequent to the taxing Act. The issue is stated by the Court as follows on pages 281 and 282 of the official reports (307 U.S.), and pages 1293 and 1294 of Lawyer's Edition (italics ours):

> "Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges *appointed after the Revenue Act of 1932* shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected."

On pages 282 and 283 of the official reports (page 1294 L. ed.), the Court specifically negatives that it passes upon any question with respect of judges appointed prior to June 6, 1932, saying:

> "After this case came here, Congress, by section 3 of the Public Salary Tax Act of 1939, amended section 22(a) so as to make it applicable to 'judges of courts of the United States who took office on or before June 6, 1932.' That section, however, is not now before us."

Also significantly enough, while *Miles* v. *Graham* was overruled so far as consistent with the current opinion, *Evans* v. *Gore* was not overruled. Therefore, in determining applicability of precedent, two conclusions are inescapable:

(1) This case is precisely within *Evans* v. *Gore* and is governed by it; and

(2) *Evans* v. *Gore* has not been overruled and remains a binding precedent.

It is true that in the majority opinion in *O'Malley* v. *Woodrough* there is language critical of the philosophy of *Evans* v. *Gore*. The significant fact is, however, that the decision of *O'Malley* v. *Woodrough* instead of being carefully limited as heretofore set forth, could well and properly have been based upon the broad conclusion that an income tax, imposed upon any Federal judge's salary, no matter what date his appointment, was not a diminution under Article III, Section 1 of the Constitution. The Court did not do so. Nothing is more frequent than for judges in later decisions to follow precedents that they would not personally have promulgated in the first instance. If a Court be required,

as a matter of judicial conscience, to overrule a precedent of long standing, upon which reliance has been placed, such is never done except with great hesitancy, and never because of the personal opinion of a judge on a mooted question. No case could be visualized in which to disturb the rule of *stare decisis* would be less appealing to a Court. There is here no broad question involving national interest of important constitutional policy. The income tax that Judge Baker and the older Federal judges would pay is negligible so far as national revenue is concerned. As heretofore stated, for many years the members of this small and necessarily decreasing group have relied upon the assurance of the Supreme Court of the United States that throughout all changes of tax imposition, they were assured of a salary undiminished by tax deduction. Under *O'Malley* v. *Woodrough* all judges appointed since June 6, 1932, and hereafter appointed, are subject to the impositions of tax Acts effective at the time of their appointment. In such a situation, would the Court destroy its long standing precedent, even if the members would not have acquiesced in *Evans* v. *Gore* at the time of its rendition? It seems that two *indicia* clearly point to a negative answer:

(a) The Court *did not overrule*, but specifically refrained from overruling *Evans* v. *Gore* in *O'Malley* v. *Woodrough*.

(b) In the opinion of *O'Malley* v. *Woodrough* it is stated:

> "* * * The assessment of the present tax was technically under the Act of 1936, but that Act merely carried forward the provisions of the Act of 1932, for the inclusion of compensation of 'judges of courts of the United States, taking

> office *after June 6, 1932*' which had been similarly incorporated in the Revenue Act of (May 10) 1934 (48 Stat. at L. 680, 686, 687, Chap. 277). Therefore, the power of Congress to include Judge Woodrough's salary as a circuit judge in his 'gross income' must be judged on the basis of the validity of sec. 22 of the Revenue Act of 1932, and not as though that power had been originally asserted by the Revenue Act of 1936. For it was the Act of June 6, 1932, *that gave notice to all judges thereafter to be appointed,* of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes." (Italics ours).

The above language clearly reflects that there was in the mind of the Court a fundamental distinction as between judges appointed prior to June 6, 1932, and those thereafter taking office. In any event, if *Evans* v. *Gore* is to be overruled, this Court alone should overrule it, but counsel believes it will not be overruled. It is respectfully submitted, in view of the precedents, the importance of the question and the other considerations here presented that certiorari should be granted.

CONCLUSION

It is respectfully submitted that this Court, in its sound discretion, may appropriately grant the writ of certiorari prayed for and that the petition and brief in support thereof present special and important reasons therefor.

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